

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

TARYN CHRISTIAN,)	CV. NO. 04-00743 DAE-LEK
)	
Petitioner,)	
)	
vs.)	
)	
CLAYTON FRANK, Director,)	
STATE OF HAWAII,)	
DEPARTMENT OF PUBLIC)	
SAFETY, et al.,)	
)	
Respondents.)	
_____)	

ORDER ADOPTING THE MAGISTRATE'S FINDINGS AND
RECOMMENDATION TO ALLOW PETITIONER TO CHOOSE BETWEEN
DISMISSAL OF THE ENTIRE PETITION OR AMENDING THE PETITION TO
DELETE THE TWO UNEXHAUSTED CLAIMS

On August 29, 2008, the Magistrate Judge issued a Findings and Recommendation to Grant in Part and Deny in Part Petition for Writ of Habeas Corpus (the "F&R"). (Doc. # 148.) Based upon previous rulings by this Court in this case, the Magistrate Judge concluded that the petition was a mixed petition because Grounds One, Two, part of Three, and Seven were exhausted, but the Closing Claim of Ground Three and the entirety of Ground Eight were unexhausted. (Id. at 20-28.)

The Magistrate Judge found that a stay of the Petition while Petitioner exhausted his unexhausted claims in State court was inappropriate because Petitioner did not have good cause for failing to exhaust the claims and the State court would find that Petitioner had waived his claims. (Id. at 26-27.) Therefore, the Magistrate Judge recommended that Petitioner be allowed to choose between dismissal of the entire Petition or deletion of the unexhausted claims so that he could proceed in this Court with the exhausted claims on the merits. (Id. at 27.) The Magistrate Judge assumed that Petitioner would delete the unexhausted claims and therefore, turned to the merits of the exhausted claims. Although both parties filed objections to the F&R on the merits decisions, neither party objected to the recommendation of filing an amended petition, or objected to the finding that it was mixed petition. In addition, Petitioner has not filed an amended petition as suggested by the Magistrate Judge.

This Court reviewed the Magistrate Judge's recommendation on this issue de novo and independently finds that the Petition is a mixed petition because it contains both exhausted and unexhausted claims. This Court also finds that Petitioner did not have good cause for failing to exhaust the Closing Claim of Ground Three or Ground Eight and that the State court would find that he waived these claims. Because there is currently a mixed petition before this Court, this

Court cannot consider the merits of the objections to the Magistrate Judge's F&R.

Accordingly, this Court gives Petitioner the opportunity to amend his Petition to remove the unexhausted claims of Ground Eight and the Closing Claim of Ground Three. Petitioner may not add claims or facts to the petition, Petitioner may only delete the unexhausted claims. Petitioner must file an Amended Petition on or before 9:00 a.m. on September 30, 2008. Assuming Petitioner files an Amended Petition in a timely fashion as directed, Respondents may stand on their previous response and may not file any further response. If Petitioner files a timely Amended Petition, this Court will rule on the cross-objections that have been filed to the F&R. If Petitioner fails to file an Amended Petition as directed herein by the date and time set, the Petition will be dismissed without prejudice. No additional briefing will be permitted.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, September 25, 2008.





David Alan Ezra
United States District Judge

Taryn Christian vs. Clayton Frank, et al., Civil No. 04-00743 DAE-LEK; ORDER ADOPTING THE MAGISTRATE'S FINDINGS AND RECOMMENDATION TO ALLOW PETITIONER TO CHOOSE BETWEEN DISMISSAL OF THE ENTIRE PETITION OR AMENDING THE PETITION TO DELETE THE TWO UNEXHAUSTED CLAIMS